

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
High-Cost Universal Service Support)	WC Docket No. 05-337

**FAIRPOINT COMMUNICATIONS, INC.
PETITION FOR WAIVER OF SECTIONS 54.312(b)(2) AND (3) OF THE
COMMISSION’S RULES AND CONDITIONAL ELECTION OF INCREMENTAL CAF
SUPPORT**

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Summary

The Commission targeted \$300 million in CAF Phase I incremental support for broadband deployment at 4 Mbps downstream/1 Mbps upstream speeds to as many locations as possible in price cap LEC territories. FairPoint committed to accept \$2,025,075 from the Phase I fund, agreeing to build broadband to 2,613 unserved locations in exchange for \$775 of support per location. In order to accept this amount, FairPoint must make up the difference between \$775 and the actual cost of bringing broadband to unserved locations in its service area.

FairPoint committed to spend over [REDACTED]

of its own capital to this end. [REDACTED]

Less than 50% of the Phase I fund was elected by eligible price cap carriers. The FCC rule providing just \$775 in support per location does not reflect the costs nor permit a sufficient return on investment for price cap carriers to bring broadband to more unserved locations. FairPoint has made a substantial commitment of capital to use a portion of the Phase I funds to expand broadband. In these circumstances, allowing the remaining funds allocated to FairPoint to lie fallow does not serve the Commission's goal of increasing broadband deployment in the near term, whereas waiving the \$775 per-location requirement would bring immediate value to rural communities where "there is no business case to offer broadband, and ... [residents] have no immediate prospect of being served, despite the growing costs of digital exclusion."¹

¹ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such*

FairPoint therefore seeks a waiver of the Commission’s rules to bring broadband to an additional 697 unserved locations with the remaining Phase I funds it was allocated, and will contribute [REDACTED]

if the waiver is granted.² Without a grant of this waiver to increase the per-location support amount, and a corresponding waiver of the election date, customers at these 697 locations will continue to wait for the broadband access that is transforming the lives of so many other Americans.

Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, Eighth Broadband Progress Report, GN Docket No. 11-121, FCC 12-90, ¶ 9 (rel. Aug. 21, 2012) (“Eighth Broadband Progress Report”), *quoting 2011 Seventh Broadband Progress Report*, 26 FCC Rcd 8008 at 8009, ¶ 1.

² The commitments to expand broadband to additional unserved locations as detailed in this Petition are conditional pending a favorable result of certain Maine litigation as described more fully in the Petition.

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On July 23, 2012, FairPoint Communications, Inc. (“FairPoint”) accepted \$2,025,075 of its eligible funding for Connect America Fund Phase I (“CAF Phase I”) incremental support for 2012, stating that it will use that funding to deploy broadband to 2,613 locations that are currently unserved by fixed broadband according to the National Broadband Map.³ FairPoint filed the *FairPoint July 23 Letter* consistent with the requirements of the Public Notice announcing support amounts for CAF Phase I incremental support,⁴ as well as the Commission’s

³ Letter from Karen Brinkmann, Counsel for FairPoint, to Marlene H. Dortch, Connect America (CAF) Phase I, Notice of Acceptance by FairPoint Communications, Inc., WC Docket Nos. 10-90 & 05-337, with attached Letter from Michael T. Skrivan, Vice President Regulatory for FairPoint Communications, to Marlene H. Dortch, Connect America Fund Incremental Support Election (filed July 23, 2012) (“*FairPoint July 23 Letter*”).

⁴ See Public Notice, Wireline Competition Bureau Announces Support Amounts for Connect America Fund Phase One Incremental Support, WC Docket Nos. 10-90, 05-337, DA 12-639, ¶ 10 (rel. April 25, 2012) (“Public Notice”) (“[n]o later than 90 days after release of this Public Notice, carriers must file notices stating the amount of support each wishes to accept”).

rules setting the deadline by which carriers must elect CAF Phase I incremental support.⁵

FairPoint, on behalf of its wholly-owned local exchange carrier (“LEC”) subsidiaries, hereby requests a waiver of the timeframe set forth in Section 54.312(b)(3) of the Commission’s rules in order to make a conditional election of additional CAF Phase I incremental support for which it was deemed eligible in the Public Notice,⁶ as well as a waiver of the requirement that CAF Phase I incremental support be used to build broadband to one unserved location for each incremental \$775 in support at Commission-designated speeds.⁷

If the Commission grants the waivers requested herein, FairPoint proposes to accept the remaining \$2,831,783 of the \$4,856,858 that it was allocated in the Public Notice, subject to the condition of a court order or a settlement agreement with the Maine Public Utilities Commission (“PUC”), that resolves in FairPoint’s favor an ongoing dispute between Northern New England Telephone Operations LLC (“FairPoint NNE”)⁸ and the Maine PUC, which is currently being litigated.⁹ Specifically, FairPoint conditions acceptance of its remaining CAF Phase I

⁵ See 47 C.F.R. § 54.312(b)(3) (“notification must be made within 90 days of being notified of any incremental support for which it [the carrier] would be eligible”).

⁶ FairPoint was allocated \$4,856,858 in CAF Phase I incremental support for 2012. See Public Notice, ¶ 9.

⁷ See 47 C.F.R. § 54.312(b)(2).

⁸ FairPoint NNE is the local exchange operating subsidiary providing telecommunications service in Maine.

⁹ See *Public Utilities Commission Investigation into Verizon Maine’s Alternative Form of Regulation; Northern New England Telephone Operations LLC et al d/b/a FairPoint Communications Joint Application for Approvals Related to Verizon’s Transfer of Property and Customer Relations to Company to be Merged with and into FairPoint Communications, Inc.*, Order Establishing Broadband Buildout Calculation, Docket Nos. 2005-155 and 2007-67 (Maine Public Utilities Commission, Jan. 11, 2012); see also *Verizon New England Inc. d/b/a Verizon Maine et al. & FairPoint Maine Telephone Companies Request for Approval of Affiliated Interest Transaction and Transfer of Assets of Verizon’s Property and Customer Relations to be*

incremental support upon a court finding or an agreement between the litigating parties that is consistent with FairPoint NNE's position that it has completed its broadband buildout requirements pursuant to the Maine PUC order issued in 2008 relating to FairPoint's acquisition of the Verizon landlines in Maine,¹⁰ as it was amended by the regulatory settlement entered into in 2010 relating to the change of control proceeding resulting from FairPoint's emergence from reorganization under Chapter 11 of the U.S. bankruptcy code.¹¹ FairPoint proposes herein to use all of the remaining \$2,831,783 CAF Phase I incremental support within the state of Maine,¹² contingent on a court finding or an agreement between the litigating parties that FairPoint NNE's

Merged with and into FairPoint Communications, Inc.; Public Utilities Commission Investigation into Verizon Maine's Alternative Form of Regulation, Notice of Appeal, Docket Nos. 2007-67 and 2005-155 (filed Jan. 31, 2012 by Northern New England Telephone Operations LLC at the Maine Public Utilities Commission).

¹⁰ *See Verizon New England Inc., Northern New England Telephone Operations Inc., Enhanced Communications of Northern New England Inc., Northland Telephone Company of Maine, Inc., Standish Telephone Company, China Telephone Company, Maine Telephone Company, and Community Service Telephone Co. re: Joint Application for Approvals Related to Verizon's Transfer of Property and Customer Relations to Company to be Merged with and into FairPoint Communications, Inc.; Public Utilities Commission Investigation into Verizon Maine's Alternative Form of Regulation, Order, Docket Nos. 2007-67 and 2005-155 (Maine Public Utilities Commission, Feb. 1, 2008) ("Merger Order").*

¹¹ *See Post Filing Regulatory Settlement – Maine, entered into by FairPoint Communications, Inc., Northern New England Telephone Operations LLC, the Maine Public Utilities Commission, and the Maine Office of the Public Advocate (Feb. 10, 2010) ("Regulatory Settlement").*

¹² FairPoint expects that the remaining \$2.8 million in CAF Phase I incremental support would be held by the Universal Service Administrative Company until resolution of the dispute with the Maine PUC and if the resolution is favorable for FairPoint then at that time the support would be distributed to FairPoint, triggering the beginning of the timeframe for the three-year buildout obligations based on the distribution date.

broadband buildout commitments have been met according to the Merger Order and Regulatory Settlement.¹³

I. BACKGROUND

A. The CAF Phase I Program

In the Commission's *USF/ICC Transformation Order*, the Commission established \$300 million in one-time funding for price cap LECs in CAF Phase I.¹⁴ The Order requires that any price cap LEC accepting CAF Phase I incremental support deploy broadband at 4 Mbps downstream/1 Mbps upstream minimum speeds to at least one unserved location for each \$775 in funding accepted.¹⁵ Specifically, the Commission found that \$775 in support per unserved location was adequate,¹⁶ in combination with additional investment from the price cap carriers, to enable broadband deployment "beyond what carriers would otherwise undertake"¹⁷ to "lower-cost areas where there is no private sector business case for deployment of broadband."¹⁸ The

¹³ See 47 C.F.R. 54.312(b)(3) ("a carrier accepting incremental support must also submit a certification . . . that incremental support will not be used to satisfy any merger commitment or similar regulatory obligation").

¹⁴ The Commission treats rate-of-return carriers affiliated with price cap LECs as price cap LECs for purposes of CAF Phase I support. See *Connect America Fund*, WC Docket No. 10-90, *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶ 129 (2011) (*USF/ICC Transformation Order*) ("Consistent with our goal of providing support to price cap companies on a forward-looking cost basis, rather than based on embedded costs, we will, for the purposes of CAF Phase I, treat as price cap carriers the rate-of-return operating companies that are affiliated with holding companies for which the majority of access lines are regulated under price caps. That is, we will freeze their universal service support and consider them as price cap areas for the purposes of our new CAF Phase I distribution mechanism."). See also 47 C.F.R. § 54.312.

¹⁵ See *USF/ICC Transformation Order*, ¶ 22. See also 47 C.F.R. § 54.312(b)(2), (b)(4).

¹⁶ See *USF/ICC Transformation Order*, ¶¶ 139 and 144.

¹⁷ *USF/ICC Transformation Order*, ¶ 137.

¹⁸ *USF/ICC Transformation Order*, ¶ 145.

Commission expressed its intention that CAF Phase I incremental support would lead to broadband deployment to as “many unserved locations as possible, given [the Commission’s self-imposed] budget constraint.”¹⁹

FairPoint commends the Commission’s “efforts to unleash the benefits of broadband for millions of homes and small businesses in unserved rural communities across the U.S.”²⁰ Access to broadband enables innovation in how we communicate, work and learn; it has created critical opportunities for better jobs, improved education, and access to state-of-the-art healthcare;²¹ it has enhanced public safety; it has created new forms of public and personal discourse, through social media and access to information. The Commission recently affirmed that the “utility of and demand for broadband continue to grow as Americans find benefits in devices, applications, and services that use broadband in their homes, schools, businesses, and on the road.”²² However, to those individuals who lack access, the benefits of broadband have yet to be realized.

Fulfilling the promise of broadband begins with fully disbursing CAF Phase I incremental support to price cap carriers for the benefit of consumers who otherwise have “no immediate prospect of being served.”²³ In launching the incremental support under CAF Phase I, the Commission noted that it was “taking \$300 million in savings recovered through reforms and

¹⁹ *USF/ICC Transformation Order*, ¶ 139.

²⁰ “FCC Kicks-Off ‘Connect America Fund’ With Major Announcement: Nearly 400,000 Unserved Americans in Rural Communities in 37 States Will Gain Access to High-Speed Internet Within Three Years,” FCC News (rel. July 25, 2012) (“FCC News July 25”).

²¹ Broadband has become not only desirable but necessary in our society, according to the Commission: “[i]n today’s economy, broadband is a vital platform for innovation and opportunity, including jobs, education, and healthcare.” FCC News July 25.

²² Eighth Broadband Progress Report, ¶ 1.

²³ *See supra*, note 1.

directing it to provide an immediate boost to connect up to 400,000 homes, businesses and anchor institutions that currently lack access to high-speed Internet.”²⁴ Yet, more than half of the CAF Phase I budget will not be used, absent a waiver of Section 54.312(b)(2). While the goal of CAF Phase I incremental support was to reach up to 400,000 homes, businesses, and anchor institutions, the amount of support elected by carriers thus far will be used to reach only 148,102 locations.²⁵

B. The Per-Location Support Under CAF Phase I Incremental Support Is Insufficient For Its Purpose.

The Commission established \$775 as the amount of support to be provided per unserved location based on cost estimation,²⁶ and then delegated that the Bureau determine how much one-time incremental support would be available to each price cap carrier.²⁷ FairPoint believes the Commission significantly underestimated the cost of broadband deployment to unserved areas, which is demonstrated by the fact that price cap carriers did not accept more than \$185 million of CAF Phase I incremental support, a more than significant portion of the \$300 million that was budgeted. Of the \$300 million available, eligible carriers accepted less than 50% of that

²⁴ “FCC Launches Connect America Fund,” Official FCC Blog, Sharon Gillett, Chief, Wireline Competition Bureau (April 25, 2012).

²⁵ The total number of locations that will be reached based on current elections is derived from the number of locations reported by carriers in their notices accepting CAF Phase I incremental support. *See infra.* note 28.

²⁶ *See USF/ICC Transformation Order*, ¶¶ 139-144.

²⁷ *See USF/ICC Transformation Order*, ¶ 138.

amount.²⁸ Specifically, only about \$115 million of the \$300 million in funding was elected.²⁹ A take rate of barely over 38% of the \$300 million CAF Phase I incremental support cannot be considered a victory for consumers who do not have access to broadband service.

²⁸ As noted herein, FairPoint accepted \$2,025,075, less than 50% of the \$4,856,858 allocated to it.

Alaska Communications Systems accepted 100% of the \$4,185,103 it was allocated. *See* Letter from Karen Brinkmann, Counsel for ACS to Marlene H. Dortch, FCC, Connect America Fund (CAF) Phase I, Notice of Acceptance by Alaska Communications Systems Group, Inc., WC Docket Nos. 10-90 & 05-337 (filed July 24, 2012).

AT&T declined to accept any of the \$47,857,148 it was allocated. *See* Letter from Robert W. Quinn, Jr., Senior Vice President, Federal Regulatory and Chief Privacy Officer, AT&T Services to Marlene H. Dortch, FCC, *Connect America Fund*, WC Docket Nos. 10-90 & 05-337 (filed July 24, 2012).

CenturyLink accepted \$35,098,975, less than 50% of the \$89,904,599 allocated to it. *See* Letter from Melissa E. Newman, Vice President, Federal Regulatory Affairs, CenturyLink to Marlene H. Dortch, FCC, CenturyLink's Notice of Acceptance of Connect America Fund Phase I Incremental Support, WC Docket Nos. 10-90, 05-337 (filed July 24, 2012).

Consolidated Communications, Inc. accepted 100% of the \$421,247 it was allocated. *See* Letter from Paul J. Feldman, Counsel for Consolidated Communications, Inc. to Marlene H. Dortch, FCC, Connect America Fund Phase I, Notice of Acceptance by Consolidated Communications, Inc., WC Docket Nos. 10-90 & 05-337 (filed July 24, 2012).

Frontier Communications Corp. accepted 100% of the \$79,979,104 it was allocated. *See* Letter from Michael D. Saperstein, Jr., Director of Federal Regulatory Affairs, Frontier Communications to Marlene H. Dortch, FCC, Frontier Communications Connect America Fund Phase I Acceptance, WC Docket Nos. 10-90 & 05-337 (filed July 24, 2012).

Hawaiian Telecom accepted 100% of the \$402,171 it was allocated. *See* Letter from Steven P. Golden, Vice President, External Affairs, Hawaiian Telecom to Marlene H. Dortch, FCC, Hawaiian Telecom, Inc. Connect America Fund Phase I Notice of Acceptance, WC Docket Nos. 10-90 & 05-337 (filed July 23, 2012).

Virgin Islands Telephone Corp. indicated it was unable to accept any of the \$255,231 it was allocated because it was unable to provide the requisite certifications due to errors in the National Broadband Map. *See* Letter from Seth Davis, Virgin Islands Telephone Corp. to Marlene H. Dortch, FCC, *Connect America Fund*, WC Docket Nos. 10-90 & 05-337 (filed July 24, 2012).

Verizon declined to accept any of the \$19,734,224 it was allocated. *See* Letter from Kathleen Grillo, Senior Vice President, Federal Regulatory Affairs, Verizon to Marlene H. Dortch, FCC, *Connect America Fund*, WC Docket No. 10-90 (filed July 24, 2012).

REDACTED – FOR PUBLIC INSPECTION

Despite FairPoint's initial desire to accept the full amount of CAF Phase I that has been allocated to it – specifically \$4,856,858³⁰ -- FairPoint determined that it was economically infeasible to bring 4 Mbps downstream/1 Mbps upstream broadband to any additional locations in all of 31 incumbent LEC operating territories³¹ based on the \$775 per unserved location requirement for any of the remaining \$2,831,783 that FairPoint elected not to accept.

[REDACTED]

³² The unelected support accounts for more than half of the CAF Phase I funds allocated to FairPoint. Notably, FairPoint will be able to use the already elected \$2,025,075 CAF Phase I support to expand broadband to 2,613 unserved locations in three of its 31 incumbent LEC study areas.³³ Over 99% will be spent in one state, Vermont, and the remaining fraction of a percent will be spent in Maine.³⁴ To accomplish the required

Windstream Corporation accepted only approximately 1% of the \$60,404,310 it was allocated. *See* Letter from Eric N. Einhorn, Senior Vice President, Government Affairs, Windstream Communications, Inc. to Marlene H. Dortch, FCC, *Connect America Fund*, WC Docket Nos. 10-90 & 05-337 (filed July 24, 2012).

²⁹ *See* FCC News July 25.

³⁰ *See supra* note 6.

³¹ FairPoint provides service in 18 states through 31 incumbent LECs and two competitive local exchange carriers.

³² *See* Declaration of Steven W. Freeman, FairPoint Director of Network Engineering, attached hereto as Attachment 1, at 2 (“Freeman Declaration”).

³³ The three FairPoint territories are FairPoint Vermont, Inc. and Telephone Operating Company of Vermont LLC, both of which are located in Vermont, and China Telephone Company, which is located in Maine.

³⁴ The amount of CAF Phase I support that FairPoint elected will bring broadband to only six unserved locations in Maine. Notably, there are 16 other states where FairPoint offers its incumbent LEC services, none of which will benefit from broadband expansion based on the

buildout, FairPoint expects to invest [REDACTED]

of its own capital in addition to the amount of support the company will receive from incremental CAF Phase I support,³⁵ almost [REDACTED]

the amount of support it will receive under its current election. This demonstrates FairPoint's commitment to extending broadband to its unserved rural customers, but also indicates the shortcomings of the CAF I incremental support.

C. The Results of the CAF Phase I Elections Call For a Commission Waiver of Its Rules on Per-Location Support.

FairPoint already has committed to expend large sums of money, [REDACTED] the amount it will receive in Phase I incremental support, in order to bring broadband at 4 Mbps downstream/1 Mbps upstream speeds to 2,613 unserved locations in Vermont and a small portion of Maine. In evaluating its service areas, network engineering requirements, price constraints, and the take rates for broadband, FairPoint could not make a business case for accepting the additional CAF Phase I funding allocated to it [REDACTED]

current FairPoint CAF Phase I election, primarily because there is not an economic business case to expand in these 16 states, but also because the 90 days within which carriers had to make a decision to elect CAF Phase I support was an insufficient amount of time in which to evaluate the business case for electing CAF Phase I incremental support for the company's rate-of-return service areas. To evaluate the economic business case in FairPoint's rate-of-return areas, the company would have had to conduct an almost mile by mile analysis of some of its most rural areas across the 15 states where its rate-of-return operating companies provide service. There simply was not enough time to conduct such an analysis in order to determine if FairPoint could bring broadband to any additional unserved locations in its rate-of-return service areas according to the Commission's specifications.

³⁵ FairPoint's capital contribution for the 2,613 locations to which it will build broadband facilities in unserved areas amounts to nearly [REDACTED] per location on top of the \$775 per unserved location CAF Phase I funding support.

³⁶ The requirement to build broadband to one unserved location for each \$775 in support makes it impracticable for FairPoint, with a reasonable investment of additional capital, to reach additional unserved locations beyond the 2,613 locations to which FairPoint has already committed to expand broadband at the required 4 Mbps downstream/1 Mbps upstream speeds. It is apparent that other carriers arrived at the same determination.

The Commission’s goal of providing an “immediate boost” to deploy broadband to as many price cap LEC locations as possible will remain unfulfilled to the extent that the unelected CAF Phase I funds are not used. This need not be the case, however. Waiver of the \$775 per unserved location requirement set forth in Section 54.312(b)(2) of the Commission’s rules is a reasonable solution for price cap carriers to use unelected CAF Phase I support to deploy broadband to many more unserved locations. FairPoint proposes that it should be granted a waiver of the Commission’s rules, allowing it to make a further election, beyond the 90-day timeframe established in the Commission’s rule § 54.312(b)(3), for the remainder of the CAF Phase I support allocated to it.

The Commission indicated in the *USF/ICC Transformation Order* that the “median cost of a brownfield deployment of broadband to low-cost unserved census blocks is \$765 per location” and then estimated that “there are 1.75 million unserved, low-cost locations in areas served by price cap carriers with costs below \$765.”³⁷ With over 60% of the \$300 million allocated for CAF Phase I incremental support not elected by price cap carriers, it now is

³⁶ See Freeman Declaration at 2.

³⁷ See *USF/ICC Transformation Order*, ¶ 142.

apparent that the cost per location in much of the price cap territories exceeds the Commission's estimate. FairPoint did extensive diligence within the 90-day timeframe provided and identified all the low-cost locations it could serve in its price cap service areas at \$775 per location plus an additional amount of company capital it could justify investing under reasonable assumptions about take rates and future revenues. The number amounts to just 2,613 locations. FairPoint could not accept over 58% of the CAF Phase I incremental support allocated to it under the requirement to build to an unserved location for each \$775 in incremental support.

The Commission should disburse the remaining \$2.8 million in CAF Phase I incremental support allocated to FairPoint, re-evaluating the cost criteria for building additional broadband locations beyond the 2,613 locations that FairPoint has already committed to build. Since the initial election of incremental support among price cap carriers, FairPoint has devoted resources to identifying additional locations that can be served with additional capital investment. While FairPoint can build far fewer locations at 4 Mbps downstream/1 Mbps upstream speeds for the remaining \$2.8 million, FairPoint believes the additional locations where broadband could be expanded would constitute an "immediate boost" to broadband deployment, benefitting rural consumers.

II. THE FAIRPOINT PROPOSAL

FairPoint proposes to elect the remainder of the \$2,831,783 allocated to it in the Public Notice, subject to certain conditions described here. FairPoint has identified 697 additional unserved locations in Maine to which it can provide broadband at 4 Mbps downstream/1 Mbps upstream speeds, using the remainder of its allocated CAF Phase I incremental support along with an additional company contribution of [REDACTED]

(over and above what the company will spend for the 2,613 eligible locations it already committed to serve).³⁸

FairPoint seeks a waiver of the Commission's rule § 54.312(b)(2), which allots only \$775 in CAF Phase I incremental support per unserved location made broadband capable at 4 Mbps downstream/1Mbps upstream speeds. After further review of its network in its price cap service areas, FairPoint can make a business case to expand broadband in Maine at the Commission-designated broadband speeds using an [REDACTED]

per-location company capital contribution and approximately \$4,062 per unserved location in CAF Phase I incremental support. At a total cost of approximately [REDACTED] per location,³⁹ the remainder of the CAF Phase I incremental support allocated to FairPoint would allow it to bring broadband to 697 new locations in Maine.⁴⁰ In order to make this further election of CAF Phase I incremental support, FairPoint also seeks a waiver of the timeframe set forth in the Commission's rule § 54.312(b)(3)

³⁸ See Freeman Declaration at 3.

³⁹ See Freeman Declaration at 2-3.

⁴⁰ If FairPoint were to apply the \$775 per unserved location requirement for these Maine locations, the per location capital requirement to expand broadband based on the real cost of deployment for these locations would be [REDACTED] and the use of FairPoint's [REDACTED] in available capital would only be able expand broadband to 136 locations in Maine. FairPoint would only receive an additional \$105,400 in CAF Phase I incremental support for these 136 locations, leaving more than \$2.7 million of the CAF Phase I incremental support allocated to FairPoint unused. In granting this waiver request FairPoint can serve 561 more locations than it would otherwise be able if the Commission's \$775 per unserved location requirement were strictly enforced. Importantly, however, there is no economic business case to justify a per-location capital contribution of [REDACTED]

that required price cap carriers to make an election of the support allocated to them within 90 days of the Public Notice.

The net effect of granting a waiver of the \$775 requirement and providing FairPoint with the \$2.8 million remainder of its CAF Phase I incremental support to expand broadband to an additional 697 unserved locations is that, for all of the \$4,856,868 in CAF Phase I incremental support allocated to it, FairPoint would be expanding broadband to a total of 3,310 unserved locations with an average per-location support amount of approximately \$1,467. Equally important, FairPoint in total would invest almost **[REDACTED]**

of its own capital to bring broadband to a total of 3,310 unserved locations in Vermont and Maine, which amounts to using approximately **[REDACTED]**

of its own capital per location.

In the locations that FairPoint accepted \$775 per unserved location, it committed to spend approximately **[REDACTED]** per location.

With that kind of capital commitment, arguably even the 2,613 locations to which FairPoint has already committed to build broadband at \$775 in per-location support are not low-cost locations as contemplated by the Commission. However, when FairPoint made the election of \$2,025,075, it did so because it was able to make a business case to spend the capital required to accept that amount of support and expand broadband to those 2,613 locations. In not electing the remaining \$2,831,783, FairPoint could not make a business case to accept \$775 per unserved location **[REDACTED]**

With a waiver of the \$775 requirement that would provide FairPoint with per-location support of \$4,062 FairPoint is able to make a business case to spend

[REDACTED] per location to bring broadband to an additional 697 unserved locations in Maine at a per-location cost of **[REDACTED]**

Despite the high cost of expanding broadband to unserved locations, FairPoint has demonstrated that it is committed to broadband expansion where it makes economic sense to do so. FairPoint urges the Commission to recognize the true costs of expanding broadband to unserved locations, as well as FairPoint's commitment to contribute its own financial resources,⁴¹ and on this basis grant a waiver of its \$775 per unserved location requirement as well as a waiver of its 90-day post Public Notice timeframe for election of CAF Phase I incremental support.

III. THE MAINE LITIGATION

FairPoint is currently in litigation with the Maine PUC regarding the status of the company's completion of its broadband buildout requirements according to the Merger Order and Regulatory Settlement in Maine. FairPoint believes that it has already met its broadband buildout requirements pursuant to the Merger Order and Regulatory Settlement, and if there is a court finding or a subsequent agreement between FairPoint and the Maine PUC that these requirements have been met, then FairPoint has determined that there is a business case with the approval of this waiver request to bring broadband at Commission-designated speeds to additional unserved locations in Maine. If the parties to the dispute cannot reach an agreement

⁴¹ Importantly, the company's financial resources committed to broadband expansion are shareholder money. Shareholders demand that their investments are made on the basis of business plans that will provide a reasonable return on such investments. The return on investments in broadband depends on the customer "take rate" and the revenues per location that reasonably can be expected.

or if the court does not issue an order that resolves the dispute in FairPoint's favor, then FairPoint would not be able to take advantage of the remainder of its unelected CAF Phase I incremental support due to the limitations in the Commission's rules that incremental CAF Phase I support "not be used to satisfy any merger commitment or similar regulatory obligation."⁴² Accordingly, should this waiver be granted, FairPoint's election of the remaining \$2.8 million in CAF Phase I incremental support would be conditioned upon favorable resolution of its dispute with the Maine PUC.

IV. GRANT OF THE REQUESTED WAIVERS IS JUSTIFIED AND WOULD SERVE THE PUBLIC INTEREST

The Commission may waive its rules for good cause shown, where special circumstances warrant a deviation from the rule, and strict compliance with the rule would be inconsistent with the public interest.⁴³ Such good cause is shown here.

The Commission was clear that its ultimate goal with the reforms initiated under the Connect America Fund is "to ensure that *all* areas get broadband-capable networks, whether through the operation of the market or through support from USF."⁴⁴ The Commission's efforts toward this goal with CAF Phase I have not been realized in that less than half of the funding allocated was not elected by price cap carriers. FairPoint agrees with Windstream that "[t]he choice before the Commission is clear: It can waive the rules in the limited fashion [requested by Windstream and FairPoint] or it can consign these thousands of rural Americans to more years of waiting for the benefits of broadband notwithstanding the availability of [significant

⁴² See 47 C.F.R. § 54.312(b)(3); *see also supra* note 13.

⁴³ 47 C.F.R. §1.3. *See generally* *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F. 2d 1153, 1159 (D.C. Cir. 1969).

⁴⁴ *USF/ICC Transformation Order*, ¶ 145.

amounts of unelected CAF Phase I support] that could be used to deliver service much sooner.”⁴⁵

The public interest is best served by ensuring that all, or almost all, of the CAF Phase I incremental support budget is used to expand broadband in price cap areas where it is not available today.

The CAF Phase I incremental fund was not intended to be a long-term or even comprehensive means of expanding broadband to all Americans. It was intended to stimulate broadband investment in the near term. While the Commission may have genuinely believed that it was reasonable to establish CAF Phase I support at \$775 for each unserved location as an “appropriate standard to spur immediate broadband deployment to as many unserved locations as possible, given [the Commission’s] budget constraint,”⁴⁶ the reality, as evidenced by the elections not made for CAF Phase I incremental support, is that this per-location support amount has not accomplished the Commission’s goal. With less than half of the CAF Phase I fund elected and only 148,102 unserved locations to be reached with broadband, FairPoint submits that the Commission has not maximized its primary goal “to reach a *significant* number of relatively low-cost locations.”⁴⁷ However, granting FairPoint’s requested waivers and disbursing its remaining unelected portion of the CAF Phase I incremental support is a prudent use of the funds and consistent with the intended use of the funds, even if the per-location support provided

⁴⁵ *Connect America Fund; High-Cost Universal Service Support*, Windstream Election and Petition for Waiver, WC Docket Nos. 10-90 and 05-337 at 3 (filed July 24, 2012) (“Windstream Petition”).

⁴⁶ *USF/ICC Transformation Order*, ¶ 139.

⁴⁷ *Connect America Fund, et al.*, WC Docket Nos. 10-90, 07-135, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, Second Order on Reconsideration, 27 FCC Rcd 4648, ¶ 20 (2012) (emphasis added).

is greater than the amount the Commission expected would be sufficient to provide the “immediate boost” for broadband deployment.

The special circumstances that warrant deviation from the Commission’s \$775 per unserved location requirement are clear. The costs of bringing broadband to unserved locations in price cap service areas are simply much higher than the Commission estimated. Importantly, FairPoint committed to spend a significant amount of its own capital in order to make its July 23rd election of CAF Phase I incremental support at \$775 per unserved location, demonstrating the true cost of expanding broadband to unserved areas. However, like other price cap carriers, FairPoint could not make a business case for accepting \$775 per unserved location for any locations in addition to the already committed 2,613 locations. While FairPoint committed to spend [REDACTED] when it elected support to build broadband to 2,613 locations, FairPoint could not commit the same level of capital spending to elect any additional support. FairPoint’s analysis was based on an appropriate evaluation of the regulatory obligations associated with the incremental support as well as relevant business factors, including demand, expected penetration rates and the need to keep prices at affordable levels. The above-average costs that FairPoint documents here for bringing broadband to unserved locations in some of the more rural areas of its service territory have created the rural/rural broadband divide in this country and the urgent need for meaningful support, in combination with reasonable carrier capital commitments, to expand broadband to these areas.

The immediate impact of not granting this waiver would be that 697 locations in Maine do not benefit from near-term broadband deployment that the \$300 million CAF Phase I fund

was intended to accomplish. Strict enforcement of the Commission’s \$775 per unserved location rule will not serve the Commission’s near-term broadband deployment goals, whereas a waiver is warranted by the facts and circumstances explained herein, and would directly serve these goals.

Granting the requested waiver would result in no harm to anyone. The \$300 million incremental CAF Phase I budget is targeted for use by price cap carriers. FairPoint seeks access only to that portion of the fund that was identified by the Bureau for FairPoint’s service areas. This reasonable amount of additional per-location support is justified. There is no business case for electing support at \$775 per unserved location, but grant of the requested waivers would allow FairPoint to expand broadband coverage in a region where the need is great, providing the “immediate boost” that was intended by CAF Phase I incremental support.

V. CONCLUSION

For the reasons discussed above, the Commission should grant the waivers requested herein, subject to the condition of a favorable result of the Maine litigation discussed herein

Respectfully submitted,

/s/

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